

**IN THE HIGH COURT OF TANZANIA
(LAND DIVISION)**

AT DAR ES SALAAM

MISC. LAND CASE APPLICATION NO. 538 OF 2020

DORIKA NYAMATAGA **APPLICANT**

VERSUS

CHRISTINA SAMWELI LYIMO **RESPONDENT**

(Arising from the Decision of the High Court of Tanzania at Land Division Misc. Land
Case Appeal No. 120 of 2016)

RULING

**Date of Last Order: 08/09/2021 &
Date of Ruling: 20/10/2021**

A.MSAFIRI, J

This is the Ruling made under Section 93 of the Civil Procedure Code Cap. 33 R.E 2009 in respect of the prayers in the chamber summons supported by the affidavit of Dorika Nyamataga, the applicant, which was also contested by the respondent, Christina Samweli Lyimo by way of counter affidavit. The applicant prayed for the following reliefs that is;

- 1. That may this honourable Court be pleased to enlarge time for the Applicant to file an application for a certificate that there is a point of law for purpose of appeal to the Court of Appeal of Tanzania.*
- 2. Costs be provided for.*

3. Any other reliefs this Court may be pleased to grant.

The hearing of Application was conducted through written submissions as ordered. On the scheduled date, the applicant's submission was drawn and filed by the learned advocate Alphonse Katemi while the respondent submissions in reply were drawn and filed by the learned advocate Aretas Kyara.

While composing this Ruling it came to my attention that the application is brought under wrong provision of the Law. The present application is brought under section 93 of the Civil Procedure Code, Cap. 33 R.E 2019 for an order of extension of time to file an application for a certificate that there is a point of law for purpose of appeal to the Court of Appeal of Tanzania. I am aware of Article 107A (2) of our current Constitution of the United Republic of Tanzania and the coming into effect of the overriding objective principles which discourages technicalities and encourages the Courts to focus on determination of the case justly and on merit. However this principle cannot be applied blindly by the courts but mandatory principles set by the statutory laws must be adhered. This was observed in the case of **Mondorosi Village Council vs. Tanzania Breweries Limited & 4 Others**, Civil Appeal No. 66 of 2017 (CAT- Arusha, Unreported). In the cited case the Court of Appeal was of the view that the overriding objective principle cannot be applied blindly against mandatory provisions of the procedural law which goes to the foundation of the case.

What emerges from the above decision is that the overriding objective is not meant to overhaul the rules of procedure but facilitate their application of it. There are some omissions which goes to the root of case which cannot be ignored. As I indicated above, the current application has been brought under Section 93 of the Civil Procedure Code Cap. 33 R.E 2009 but the law clearly provides under Section 47 (1) and (4) of the Land Disputes Courts Act Cap. 216 R.E 2019 that all applications to the Court of Appeal shall be brought under the Court of Appeal Rules and The Appellate Jurisdiction Act. I wish to reproduce hereunder the said section;

*(4) The procedure for appeal to the Court of Appeal under this section **shall** be governed by the Court of Appeal Rules. (Emphasis is added)*

I wish to add one point by way of emphasis. Under the above provision the word "**shall**" is used. In terms of Section 53 (2) of the Interpretation of Laws Act (Cap 1 R.E. 2002) where in a written law the word "**shall**" is used in conferring a function, such word shall be interpreted to mean that the function so conferred is mandatory. The law also provides that when it comes for matter of extension of time to process an appeal to the Court of Appeal of Tanzania, Section 11 (1) of the Appellate Jurisdiction Act Cap. 141 R.E 2019 shall apply.

I do not think that there is need to further delay here. It is common knowledge that Section 47 of the Land Disputes Court Act Cap, 216 R.E

2019 and Section 11 (1) of The Appellate Jurisdiction Act Cap. 141 R. E 2019, regulates Land Appeals procedures to the Court of Appeal of Tanzania. In the present matter, the applicant has lodged an application for extension of time to apply for certificate on point of law under the Civil Procedure Code which is not applicable at all. Processing application of extension of time with intention to go to the Court of Appeal in land matters lodged under any other law apart from the above is to move the court wrongly which renders the application to be incompetent before the same. It was held in the case of **Harish Ambaram Jina (by his Attorney Ajar Patel) vs. Abdulrazak Jussa Suleiman** [2004] TLR 343 that:-

"The Court is not properly moved where a wrong provision of the law is cited in a Notice of Motion. "

In an earlier decision of the Court of Appeal in the case of **National Bank of Commerce vs. Sadrudin Meghji** [1998] TLR 503; in making reference to a similar error of citing a wrong provision of the law to move the Court, the Court said: -

"It follows therefore that the application has been filed by a Notice of Motion under an inapplicable section of the law. Consequently, as the Court was not properly moved, the application is likewise, incompetent."

Furthermore, I have considered that in the present Application both parties are being represented by learned advocates, therefore the point that a layman in law is not to be bound by legal technicalities is hereby waived.

Having said all that I am convinced that the Application before me has been brought under the wrong provision of law and therefore the available remedy is to be terminated. The Application is hereby struck out for being incompetent. Leave is granted to refile under proper law. Costs to follow in the cause.

It is so ordered.

Dated at Dar es Salaam this 20th of October 2021.



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A. MSAFIRI

JUDGE

